Sathunavakey @ Kanagaratnam Sivajothy v Oriental Bank Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–502 OF 1998
ABDUL KADIR SULAIMAN, TENGKU BAHARUDIN SHAH AND AZMEL JJCA
26 OCTOBER 2007

Land Law — Charge — Order of sale — Whether O 83 r 3(3) of the Rules of the High Court 1980 complied with — Failure to provide statutory particulars in affidavit-in-support of application — Whether curable by subsequent supplemental affidavit — Whether cause to the contrary

This appeal was against the decision of the learned high court judge allowing respondent chargee's application for order of sale of appellant's land under s 256 of the National Land Code ('NLC') to recover the sum of RM1,204,142.27 allegedly due and owing to the respondent as at 30 June 1997 in respect of loan facilities granted by respondent to the appellant and to Jothy's Restaurant for her benefit. The respondent in the high court raised a preliminary objection that the appellant's affidavit in reply (encl 8) purportedly an affidavit of the appellant was in fact affirmed not by the appellant but by one Sivajothy a/p Nagalingam. The learned high court judge based on the preliminary objection, rejected the appeallant's affidavit in reply. The appellant submitted that the respondent knew that Sivajothy a/p Nagalingam and Sathunavakey @ Kanagaratnam Sivajothy referred to the same person as the relevant loan application was made in the name of Sivajothy a/p Nagalingam. The respondent was alleged to have acted mala fide in raising the preliminary objection as they knew very well that the two names referred to the same person. The appellant's other point was that the respondent's alleged failure to comply with O 83 r 3(3) of the Rules of the High Court 1980 ('RHC'). The amounts of interest in arrears were calculated only up to 30 June 1997, and the same date was used for the amounts due and owing under the charges, instead of the dates of issue of the originating summons on 2 October 1997 or of the supporting affidavit on 1 October 1997.

Held, allowing the appeal:

(1) The learned judge acted in haste when rejecting the affidavit. He had all

the evidence before him to show that the two names refer to the same person. The appellant herself acknowledged that encl 8 was her affidavit and the loan application was signed by the same person. The respondent's affidavit in fact exhibited all three charge documents in the appellant's name with the same identity card number and address as those of Sivajothy d/o Nagalingam the applicant. All these documents bore the same signature of K Sivajothy who must be one and the same person (see para 8).

(2) The respondent was required to satisfy the requirements in para (3)(c) of O 83 r 3 of the RHC in that the originating summons and the affidavit must state the amount of any interest or instalments in arrear as at the date of the issue of the originating summons and the date of the affidavit. The supplementary affidavits filed by the respondent thereafter failed to cure the defect in the non-compliance (see paras 13–14).

[Bahasa Malaysia summary

Rayuan ini adalah terhadap keputusan hakim mahkamah tinggi yang bijaksana dalam membenarkan permohonan pemegang gadaian responden untuk satu perintah jualan hartanah perayu di bawah s 256 Kanun Tanah Negara ('KTN') untuk mendapatkan balik jumlah RM1,204,142.27 yang dikatakan berhutang dan kena dibayar kepada responden pada 30 Jun 1997 berhubung dengan kemudahan pinjaman yang diberikan oleh responden kepada perayu dan kepada Restoran Jothy untuk manfaatnya. Responden di mahkamah tinggi telah membangkitkan satu bantahan awal bahawa afidavit jawapan perayu (kandungan 8) yang kononnya satu afidavit perayu sebenarnya diakui bukannya oleh perayu tetapi satu Sivajothy a/p Nagalingam. Hakim mahkamah tinggi yang bijaksana berdasarkan bantahan awal tersebut, telah menolak afidavit jawapan perayu. Perayu menghujahkan bahawa responden mengetahui bahawa Sivajothy a/p Nagalingam dan Sathunavakey @ Kanagaratnam Sivajothy merujuk kepada orang yang sama oleh kerana permohonan pinjaman dibuat di atas nama Sivajothy a/p Nagalingam. Responden juga dikatakan bertindak secara mala fide dalam membangkitkan bantahan awal tersebut oleh kerana mereka tahu bahawa kedua-dua nama merujuk kepada orang yang sama. Isu yang satu lagi yang dibangkitkan perayu ialah kegagalan responden mematuhi A 83 k 3(3) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Amaun faedah yang tertunggak dikira hanya setakat 30 Jun 1997, dan tarikh yang sama digunakan untuk amaun yang berhutang dan kena dibayar di bawah caj-caj tersebut, dan bukannya tarikh pengeluaran saman pemula pada 2 Oktober 1997 ataupun afidavit sokongan pada 1 Oktober 1997.

Diputuskan, membenarkan rayuan:

(1) Hakim mahkamah yang bijaksana telah bertindak secara tergesa-gesa dalam menolak afidavit tersebut. Beliau mempunyai kesemua bukti sebelumnya untuk menunjukkan bahawa kedua-dua nama merujuk kepada orang yang sama. Perayu sendiri telah memaklumkan bahawa kandungan 8 adalah afidavitnya dan permohonan pinjaman ditandatangani oleh orang yang sama. Afidavit responden sebenarnya melampirkan kesemua tiga dokumen gadaian di bawah nama perayu dengan kad pengenalan yang sama dan alamat seperti yang dimiliki oleh Sivajothy d/o Nagalingam pemohon tersebut. Kesemua dokumen-dokumen ini mempunyai tandatangan yang sama iaitu K Sivajothy yang semestinya adalah orang yang sama (lihat perenggan 8).

(2) Responden perlu memenuhi keperluan-keperluan di perenggan (3)(c) A 83 k 3 KMT iaitu saman pemula dan afidavit harus menyatakan amaun sebarang faedah atau ansuran yang tertunggak setakat tarikh pengeluaran saman pemula dan tarikh afidavit tersebut. Afidavit tambahan yang difailkan oleh responden selepas itu gagal memulihkan kecacatan ketidakpatuhan tersebut (lihat perenggan 13–14).]

Notes

For cases on order of sale, see 8(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2255–2382.

Cases referred to

Citibank NA v Ibrahim bin Othman [1994] 1 MLJ 608 (refd)

Diamond Peak Sdn Bhd v United Merchant Finance Bhd [2003] 2 MLJ 346 (refd)

Low Lee Lian v Ban Hin Lee [1997] 1 MLJ 77 (refd)

Maimunah bte Megat Montak v Mayban Finance Bhd [1996] 2 MLJ 422 (refd)

Legislation referred to

Courts of Judicature Act 1964 s 42(1)
National Land Code s 256
Rules of the High Court 1980 O 41 r 1(7), O 83 r 3(3)

Appeal from: Originating Summons No S2–24–792 of 1997 (High Court, Kuala Lumpur)

Satvinder Singh (Manjeet & Assoc) for the appellant.
Phang Sweet Ping (Albar Zulkifli & Yap) for the respondent.

Tengku Baharudin Shah JCA (delivering judgment of the court):

[1] This appeal is against the decision of the learned High Court judge at Kuala Lumpur allowing the respondent chargee's application for an order of sale of the appellant's land under s 256 of the National Land Code ('NLC') to recover the sum of RM1,204,142.27 allegedly due and owing to the respondent as at 30 June 1997 in respect of loan facilities granted by respondent to the appellant and to Jothy's Restaurant for her benefit. Three legal charges were executed by the appellant over the said land as security, one for each of the three facilities.

[2] We did not hear oral arguments of counsel due to constraint of time but by consent of both parties written submissions were submitted to us for consideration and decision.

[3] Only two issues are raised on behalf of the appellant in this appeal. They are:

(i) that the learned judge, on the respondent's preliminary objection, rejected the appeallant's affidavit in reply, and

(ii) there is cause to the contrary in that the respondent failed to comply with the mandatory requirements of O 83 r 3(3)(c) of the Rules of the High Court 1980 ('RHC').

REJECTION OF AFFIDAVIT IN REPLY

[4] Having given due notice to the appellant of the preliminary objection, the respondent argued that the appellant's affidavit in reply ('encl 8'), purportedly an affidavit of the appellant as averred in para 1 therein, was in fact affirmed not by the appellant but by one Sivajothy a/p Nagalingam. This is said to be a clear breach of the requirement of O 41 r 1(7) of the RHC which reads:

(7) Every affidavit must be signed by the deponent and the jurat must be completed and signed by the person before whom it is sworn.

[5] The learned judge found the point well taken and rejected encl 8 holding that there was totally no nexus between the two persons. Even assuming the person affirming was the appellant, nothing was said in encl 8 to that effect. The learned judge further, in view of such rejection, refused to consider the averments in encl 8 which the appellant sought to rely on in her subsequent affidavit ('encl 11').

[6] It is submitted on behalf of the appellant that she had in fact acknowledged in encl 11 that encl 8 was affirmed by her. It is further submitted that the respondent knew that Sivajothy a/p Nagalingam and Sathunavakey @ Kanagaratnam Sivajothy refer to the same person as the relevant loan application was made in the name of Sivajothy a/p Nagalingam.

[7] Learned counsel further refers to the respondent's first affidavit in reply which at para 7.2.1 states that the appellant Sathunavakey @ Kanagaratnam Sivajothy applied for and signed the loan applications exhibited as 'J–10' which application forms were in fact made and signed by Sivajothy d/o Nagalingam. The respondent is alleged to have acted mala fide in raising the preliminary objection as they knew very well that the two names refer to the same person.

[8] I have no hesitation in finding that the learned judge acted in haste when rejecting encl 8. He had all the evidence before him to show that the two names refer to the same person. The appellant herself acknowledged that encl 8 was her affidavit and the loan application was signed by the same person. The respondent's affidavit in fact exhibited all three charge documents J1, 2 and 3 in the appellant's name with the same identity card no 8072178 and address as those of Sivajothy d/o Nagalingam the applicant in exh J-10. All these documents in fact bear the same signature of K Sivajothy who must be one and the same person. The learned judge had clearly erred and the appellant therefore succeeds on this ground.

CAUSE TO THE CONTRARY

[9] The appellant's other point is the respondent's alleged failure to comply with O 83 r 3(3) of the RHC. The respondent's originating summons was issued on 2 October 1997 but in the supporting affidavit dated 1 October 1997 the overdue interest and the amounts due and owing, in the respective charges were calculated only up to 30 June 1997. The subsequent supplementary affidavits merely updated the overdue amounts up to the next hearing dates of the application. It is submitted, on the authority of *Diamond Peak Sdn Bhd v United Merchant Finance Bhd* [2003] 2 MLJ 346, that this is a fatal non-compliance with the mandatory requirement of O 83 r 3(3)(c) and r 3(6). The same issue is said to have been similarly decided earlier in *Citibank NA v Ibrahim bin Othman* [1994] 1 MLJ 608 which decision was endorsed by the Federal Court in *Maimunah bte Megat Montak v Mayban Finance Bhd* [1996] 2 MLJ 422.

[10] In the oft quoted case of *Low Lee Lian v Ban Hin Lee* [1997] 1 MLJ 77, Gopal Sri Ram JCA listed non-compliance with O 83 r 3(3) in the

second category of cases where cause to the contrary within s 256(3) of the NLC may be established at pp 82–83:

> These are the following categories of cases where cause to the contrary within s 256 (3) of the NLC may be established:
>
> Firstly, …;
>
> Secondly, a chargor may show cause to the contrary within s. 256 (3) of the Code by demonstrating that the charge has failed to meet the conditions precedent for the making of an application and order of sale, … Similarly when the notice demands sums not lawfully due from the charge.
>
> Thirdly, …

And at p 88:

> A judge hearing an application under s 256 must bear in mind that the procedure under the section is meant to be speedy and summary in nature. Therefore, the trial judge must first be concerned with whether the chargee has given the appropriate statutory notices as stipulated in the NLC. *Next, he must ensure that the procedural requirements prescribed by O 83 of the Rules of the High Court 1980 has been complied with.* Then he is concerned with the very narrow question whether the material produced before him by the charger constitutes 'case to the contrary'.
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> (Emphasis added.)

O 83 r 3(3) of the RHC reads as follows:

> (3) where the plaintiff claims delivery of possession the affidavit must show the circumstances under which the right to possession arises and, except where the court in any cases or class otherwise directs, the state of the account between the charger and chargor with particulars of —
>
> (a) The amount of the advance;
>
> (b) The amount of the repayments;
>
> (c) The amount of any interest or installments in arrear at the date of issue of the originating summons and at the date of the affidavit; and
>
> (d) The amount remaining due under the charge.

And O 83 r 6 states:

> (6) When the plaintiff claims payment of money secured by the charge, the affidavit must prove that the money is due and payable and give the particulars mentioned in paragraph (3).

[11] In *Citibank NA v Ibrahim bin Othman* it was held that on a reading of O 83 rr (1)(a), (b), (c), 3(3) and 3(6) together, it was incumbent on the plaintiff to provide the statutory particulars in the first affidavit. To quote Shanker J (as he then was) in that case, 'The objective of O 83 r 3 is to enable the defendant to know at least by the date the originating summons is filed, what is the exact sum he is legally liable to pay so that he can make up his mind to contest or pay up. If there is a dispute as to the amount payable, the court must be able to say precisely when making the order 'the total amount due to the chargee at the date on which the order is made. These words are from s 257(1(c) of the National Land Code 1965 and they are mandatory.' The Federal Court approved the ratio in that case in *Maimunah bte Megat Montak*.

[12] This court when visiting the same issue in *Diamond Peak Sdn Bhd* held that the respondent is required to satisfy the requirements in para (3)(c) of O 83 r 3 in that the originating summons and the affidavit must state the amount of any interest or instalments in arrear as at the date of the issue of the originating summons and the date of the affidavit. Abdul Kadir Sulaiman JCA (as he then was) in delivering the judgment of that court states (at p 354):

> The originating summons in this case was issued and the affidavit in support was dated on 20 March 1986 respectively. However, the figures given in the summons and the affidavit relate to the outstanding sum together with overdue interest due and owing by the appellant to the respondent as at 17 January 1986 with further interest to be calculated from 18 January 1986 till date of full payment, and not the position as at 20 March 1986 as so required by para (6) read with paragraph (3)(c) of O. 83 r 3 of the RHC. … There was, however, a supplementary affidavit affirmed by the general manager of the respondent dated 18 September 1986. But, the position of the outstanding balance of money due and owing by the appellant to the respondent on the said charge given was as at 22 September 1986 which failed to cure the defect in non-compliance with the necessary paragraphs earlier mentioned.

[13] The respondent in that case was held to have clearly failed to comply with the mandatory requirements of O 83 r 3(3)(c) and 3(6) of the RHC which constituted an additional ground for allowing the chargor's appeal.

[14] The situation is no different in the present case. The amounts of interest in arrears are calculated only up to 30 June 1997, and the same date is used for the amounts due and owing under the charges, instead of the dates of issue of the originating summons on 2 October 1997 or of the supporting affidavit on 1 October 1997. The supplementary affidavits filed by the

respondent thereafter, as in the cases cited, fail to cure the defect in the aforesaid non-compliance. This ground of appeal must therefore likewise succeed.

[15] For the aforesaid reasons, I would allow the appellant's appeal with costs and set aside the order of sale made by the learned trial judge. Deposit is refunded to the appellant.

[16] This appeal was heard by a panel of three judges of this court when we reserved judgment. Our learned brother, Abdul Kadir Sulaiman JCA the chairman of the court, had since retired leaving the two of us to determine the appeal by virtue of s 42(1) of the Courts of Judicature Act 1964. My learned brother Azmel JCA (now FCJ) had read this judgment in draft and registered his agreement. Order accordingly.

Appeal allowed.

Reported by Sally Kee